

22 OCT 1976

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Jen OMB

MEMORANDUM FOR: Associate General Counsel

FROM :   
Chief, Procurement Management Staff, OL

SUBJECT : CIA Procurement Authority

1. During FY 1976, the new Office of Federal Procurement Policy (OFPP) issued its first regulatory issuance which put DOD and NASA under the Armed Services Procurement Regulations (ASPR) and all other Federal agencies under the Federal Procurement Regulations (FPR). In our response to OFPP's request for comment on its first regulatory issuance, it became necessary to establish an Agency position on whether it operates its procurement system in accordance with the FPR or the ASPR.

2. Attachment 1 hereto requests a waiver from the FPR and authority to follow, to the maximum practicable extent, the ASPR. Attachment 2 is the requested approval.

3. We would appreciate your office taking appropriate action to include in the "Guide to Central Intelligence Agency Statutes and Law" the impact of attachments 1 and 2.

4. In addition to the action requested in paragraph 3, it is requested that appropriate action be taken to incorporate into the "Guide" those parts of EO 11905 which impact on the procurement process.



Atts

cc: ADD/A, w/atts  
D/L, w/atts  
✓OLC, w/atts

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12 AUG 1976

The Honorable Hugh E. Witt  
Administrator for Federal Procurement  
Office of Management and Budget  
Washington, D. C. 20503

Dear Mr. Witt:

Your memorandum of December 22, 1975, requested our views on the draft Office of Federal Procurement Policy (OFPP) Regulation No. 1. The Central Intelligence Agency's (CIA) comments were provided during a meeting with you at your office on February 24, 1976, and in my memorandum to you dated March 2, 1976. During the meeting with you and in the March memorandum, we requested an exemption from OFPP No. 1 to allow this Agency to continue to utilize the Armed Services Procurement Regulation (ASPR) as a guide for its procurement policies rather than the Federal Procurement Regulations (FPR) and agreed that the exemption would be implemented by separate correspondence with you rather than as a change to the regulation. This letter is in response to a June 29, 1976, request from your Mr. Haugh for additional information and to specifically request an exemption from the FPR and authority to follow, instead, the ASPR.

The basic procurement authority for CIA is found in Sections 3 and 8 of the CIA Act of 1949, 63 Stat. 208, PL 81-110, June 20, 1949, as amended. This Act authorizes the CIA to procure necessary supplies and services by either formally advertised or negotiated procurement methods in accordance with selected provisions of the Armed Services Procurement Act of 1947, 62 Stat. 21, PL 80-413, February 19, 1948. Section 8a of the CIA Act of 1949 provides broad authority for expenditure of funds made available to the Agency by appropriation or otherwise notwithstanding other provisions of law; moreover, Section 8b of the Act authorizes

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the expenditure of funds without regard to law and regulation for objects of a confidential, extraordinary, or emergency nature. The certification of the Director of Central Intelligence suffices for the settlement of such expenditures without further review by the General Accounting Office. The Federal Property and Administrative Services Act of 1949, 63 Stat. 377, PL 81-152, June 30, 1949, 40 U.S.C.A. 474 (17) provides an exemption for CIA with the language: "Nothing in this act shall impair or affect any authority of . . . (17) the Central Intelligence Agency; . . ." Executive Order 11905, United States Foreign Intelligence Activities dated 18 February 1976, also impacts on CIA procurement. It recognizes the President's concern, among other things, for conduct of research and development efforts by the Agency. Section 4(b)(7) directs that CIA "Carry out or contract for research, development and procurement of technical systems and devices relating to the functions authorized in this subsection.", and in Section 4(b)(9) that CIA " . . . conduct administrative, technical and support activities in the United States or abroad as may be necessary to perform the functions described in paragraphs (1) through (8) above, including procurement . . . development of essential cover and proprietary or unclassified research, analytical and developmental services and specialized expertise; and entering into similar arrangements with academic institutions . . . ."

Our present procurement practices follow closely those of the Department of Defense (DOD) and are best described by the [ ] which states: "It is the policy of the Central Intelligence Agency to apply the Armed Services Procurement Regulation (ASPR) to procurement of supplies and services. However, the extraordinary authorities of the CIA Act of 1949 will be applied when conformance to the requirements of the ASPR would adversely affect the accomplishment of an Agency program." The term "extraordinary authority," used in this excerpt, refers to Section 8 of the CIA Act which is discussed in the preceding paragraph. Our contract boilerplates include mandatory ASPR clauses and our contractors are required to utilize standard DOD forms for reporting of patent, property, or other matters. Audit procedures follow closely the Defense Contract Audit Agency (DCAA) Manual, and we work closely with DCAA to avoid duplication of effort in the establishment of indirect rates. DOD training courses in the field of procurement are a mandatory part of our career development plans for procurement personnel. While we are not familiar with security

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and classification requirements of other civilian agencies, we suspect that our requirements in this area are closer to those of DOD. We are a subclaimant to DOD in the Defense Materiel System, and our contracts include appropriate designators as to the assigned priority rating. The types of supplies and services we require are most like those of DOD. This fact results in high frequency of commonality in the use of contractors by CIA and DOD. Appeals from decision of our contracting officers are referred to the Armed Services Board of Contract Appeals. Our close working relationship with DOD, described in this paragraph, also carries over into the areas of supply, maintenance, technical, and research and development. Nonetheless, the CIA must maintain its independence from DOD to perform its statutory missions.

Necessary variances from the ASPR result primarily from the fact that the Director of Central Intelligence is responsible for the protection of intelligence sources and methods. This responsibility is included in subsection (d)(3) of the National Security Act of 1947, 61 Stat. 495, PL 80-253, July 26, 1947. This responsibility is further defined in Executive Order 11905, United States Foreign Intelligence Activities dated 18 February 1976. Section 4(b)(8) directs CIA to "Protect the security of its installations, activities, information, and personnel." In many of our procurements the fact that we are contracting with a specific company or that we have invited a group of companies in a particular field of expertise to bid would provide information to the opposition that we are interested in identifiable intelligence collecting techniques. We, therefore, have determined that we should reduce visibility on our contracting as much as possible; and, while we attempt to obtain competition to the maximum degree possible consistent with the nature of the supplies or services being purchased, we cannot advertise our procurement actions, nor can we prudently synopsise and publicize our negotiated procurement actions on either a preaward or post award basis. This would be one example of variance from ASPR. A second example would be the fact that, while we incorporate standard ASPR clauses into our contracts, we modify those clauses that require or allow privity by third parties to our contracts to exclude such privity without the expressed approval of the contracting officer. Examples of such clauses are the Renegotiation Act, Examination of Records, Audit, EEO, etc.

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To describe our system of review and oversight and checks and balances it is first necessary to briefly describe our procurement organization. The Director of our Office of Logistics in the Directorate for Administration exercises all delegable procurement authority of the Director of Central Intelligence as Agency head, except as otherwise specifically delegated by the Director. Production and services procurements, automatic data processing equipment acquisitions, general purchases, and Federal Supply Schedule buys are centralized in the Procurement Division in the Office of Logistics. For research and development procurements, the Director of Logistics has established a decentralized procurement system consisting of contracting teams assigned to operating offices with sufficient contract volume to warrant such action. Each of the research and development contracting teams and each of the branches within the Procurement Division is staffed with a senior contracting officer who holds a written delegation of contracting authority. He is supported by a sufficient number of negotiators to handle his volume of contracts, plus a security officer and a price/cost analyst. A Procurement Management Staff, reporting directly to the Director of Logistics, assists him in the management of the decentralized research and development teams and the centralized Procurement Division. This Staff functions as the overall point of coordination for the creation and maintenance of uniform Agency procurement policies and procedures and acts as a focal point for efforts to increase the efficiency and effectiveness of Agency procurements. This Staff also performs periodic reviews, for the Director of Logistics, of the contracting teams and the Procurement Division to insure that procurement policies are implemented by uniform procedures and practices. The chief of this staff serves as the Agency representative on various interagency committees concerned with procurement. There also is a Contract Review Board (CRB) which reviews proposed procurements having an estimated value of \$150,000 as well as selected procurements which might affect Agency contractual policy or procedures. The Board makes recommendations to the Director of Logistics who makes the final decision on whether to approve a contract award. The Board is also charged with the responsibility for providing recommendations on Agency procurement policies, procedures, and practices when requested to do so by the Director of Logistics. Membership on the Board includes senior officer representation from each directorate, plus advisors from the Office of General Counsel, Industrial Contract Security, and the Contract Audit Staff. Because of the responsibility of

the Director for protection of sources and methods (discussed above), this Agency also maintains its own security staff to handle security matters relating to contracts and an audit staff to perform price/cost analysis and necessary interim and final audits of contracts. Both of these staffs maintain close liaison with counterpart organizations in DOD.

Review and oversight of Agency procurement actions occurs in several different ways and at different levels. First, all procurement requirements are reviewed at least quarterly within the operating components as a part of budget presentations and in all instances, other than miscellaneous items, are approved by the head of the operating directorate. Specific actions which involve: (1) politically sensitive projects including a significant risk of embarrassment to the Agency or the U.S. Government; (2) major contractual agreements undertaken by the Agency in behalf of and funded by other agencies; (3) real property transactions that have potential for creating security, political, or operational difficulties; or (4) individual transactions involving more than \$500,000 require notice of imminent action to the Agency Comptroller who may refer the issue to the Deputy Director or the Director for additional review and/or approval. External to these command approvals for the operating directorate, actions expected to exceed \$150,000 must, as previously discussed, be approved by the CRB. All CIA contracts are reviewed by the General Counsel for their legal sufficiency and for compliance with Agency procurement regulations and Federal law. Finally, the Director of Central Intelligence has established an internal audit function within his immediate office which conducts periodic audits of Agency procurement activities. This activity is an arm of the Inspector General and reviews not only individual contracts for compliance with Agency regulations and Federal procurement policies, but also reviews the procurement process from a management and efficiency standpoint.

Operating components while generating requirements and establishing budgetary levels for their programs are not delegated contracting officer authority to execute contracts on behalf of the Government. This right is reserved to our contracting officers and, as in other agencies, constitutes a critical part of our system of checks and balances. A second important check and balance is provided by our General Counsel who can stop issuance of a contract if not

consistent with applicable law. The Contract Review Board with its interdirectorship membership is also considered to be an important check and balance along with the required approval of the Director of Logistics...

While procedures described herein are unique in certain aspects, they follow closely DOD procedures and the ASPR. In view of this, the CIA requests that OFPP approve an exemption from OFPP Regulation No. 1. The specific request is that this Agency be exempted from the Federal Procurement Regulation published by the General Services Administration and authorized to follow, instead, to the maximum practicable extent the Armed Services Procurement Regulation.

May I say in closing that I appreciate very much the assistance and guidance provided to our procurement personnel by your Mr. Haugh in his letter of June 29, 1976. I trust that information herein will facilitate your approval of the exemption requested above.

Sincerely,

/s/ Michael J. Malanick

Michael J. Malanick  
Acting Deputy Director  
for  
Administration

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/s/ James H. McDonald

James H. McDonald  
Director of Logistics

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EXECUTIVE OFFICE OF THE PRESIDENT

OFFICE OF MANAGEMENT AND BUDGET

WASHINGTON, D.C. 20503

OFFICE OF FEDERAL  
PROCUREMENT POLICY

OCT 6 1976

Mr. Michael J. Malanick  
Acting Deputy Director  
for Administration  
Central Intelligence Agency  
Washington, D. C. 20505

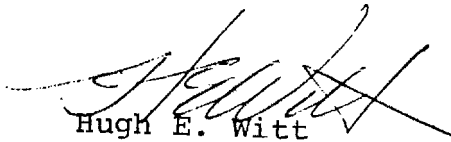
Dear Mr. Malanick:

The proposed Office of Federal Procurement Policy (OFPP) Regulation No. 1 establishes a Federal Procurement Regulatory System applicable to the executive agencies. Section 5.a. of the regulation provides that the Armed Services Procurement Regulation (ASPR) shall be applicable to the Department of Defense and to the National Aeronautics and Space Administration (NASA), and that the Federal Procurement Regulations (FPR) shall be applicable, except for NASA, to the civilian executive agencies, and, in certain authorized areas, to all executive agencies.

Your letter of August 12, 1976, sets forth a detailed justification for, and explanation of, your agency's longstanding practice of following the ASPR -- to the maximum extent practicable consistent with your statutory responsibilities and agency programs -- and requests an exemption from the above requirements so as to continue that practice.

Based upon the justification contained in your letter, the Central Intelligence Agency is hereby exempted from the applicability requirements of Section 5.a., of OFPP Regulation No. 1, and may follow the ASPR -- to the maximum practicable extent -- instead of the FPR, except in those areas where the FPR is applicable to all executive agencies.

Sincerely,

  
Hugh E. Witt  
Administrator